Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HARVEY NICHOLAS WEAVER

PETITIONER

vs.

STATE OF CALIFORNIA, et al.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED

Does the fact that defense counsel did not present the facts of the Petitoner's innocence, including that the Petitoner's accuser stated, outside of court, that she was brainwashed into making the accusations, scientific evidence of his good character and the Judge's refusal to let the Petitioner address the court on his own behalf, a violation of the Sixth Amendment to the United States Constitution?

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No. _____

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HARVEY NICHOLAS WEAVER
, PETITIONER

vs.

STATE OF CALIFORNIA, et al.,
, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner, Harvey Nicholas Weaver, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit denying a certificate of probable cause to consider to fact that petitioner's accuser stated that she was brainwashed into accusing him of touching her and that fact was not brought up in the trial with additional evidence of the petitioner's innocence.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on September 24, 1993. A timely Motion for Reconsideration was filed on November 16, 1993. The Court of Appeals' denial of the Motion for Reconsideration was issued on February 17, 1994. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the United States Constitution.

STATEMENT OF THE CASE

The United States District Court, Central District of California, had jurisdiction pursuant to Title 18, U.S.C. § 3231.

Petitioner's stepdaughter (Sylvia Typaldos) brainwashed Petitioner's grandstepdaughter (Christina Typaldos) into accusing him of touching her. The grandstepdaughter told the an pediatric clinic interviewer that her aunt (Petitioner's stepdaughter) "badgered" her into accusing the Petitioner. This evidence was not presented in the trial by defence counsel even although the Petitioner ask counsel present the evidence. Failure to present this strong evidence of the petitioner's innocence deprived the petitioner strong evidence of the Petitioner's innocence.

When the Petitioner requested the Judge to let Petitioner address the court the Judge rejected the request without a stated reason.

Sylvia Typaldos has gone to the West Covina police and accused the Petitioner of;

1) Killing 4 or 5 children about 30 years ago.
2) Killed a neighbor woman about 30 years ago.
3) That her mother an petitioner have ever been married.

Defence counsel was ineffective by not having a Psychological Assessment of the Petitoner preformed and presented at the trial. Petitioner has had a Psychological Assessment done which indicates that the Petitioner is not a pedophilic.

REASON FOR GRANTING THE WRIT

Certiorari should be granted by this Court because the Court has unequivocally decided that a defendant is entitled to have all available evidence of his innocence presented at his trial. A statement by the Petitioner's accuser that she was badgered to accuse the Petitioner and the fact the person that badgered her has made accusations that the Petitioner killed four or five children indicate that the accusations are fantasies. Six eyewitness's, to one of the two charges, testified that the Petitioner is innocence of that charge.

Defence counsel's failure to present the evidence of Petitioners innocence and the Judge's failure to let the Petitioner address the court on his own behalf resulted in a unfair trial.

CONCLUSION

For the facts stated above, it is requested that this matter be remanded to the Court of Appeals for their determination.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-56035

D.C. CV-93-1325-DMT

HARVEY NICHOLAS WEAVER,
Appellant/Petitioner

vs.

STATE OF CALIFORNIA, et al.,
Appellee/Respondent

Before: FLETCHER and O'SCANNLAIN, Circuit Judges.

Petitioner's motion for reconsideration of the court's September 24, 1993 order is DENIED.

FILED
FEB 17 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 93-1335-DT(JR)

HARVEY NICHOLAS WEAVER,
Appellant/Petitioner

JUDGMENT

vs.

STATE OF CALIFORNIA, et al.,
Appellee/Respondent

IT IS ADJUDGED that the petition is dismissed.

DATED: *6/29/93*

signed
DICKREN TEVRIZIAN
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 93-1335-DT(JR)

HARVEY NICHOLAS WEAVER,
Appellant/Petitioner

REPORT AND RECOMMENDATION ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

vs.

STATE OF CALIFORNIA, et al.,
Appellee/Respondent

This Report and Recommendation is submitted to the Honorable Dickran Tevrizian, United States District Court Judge, pursuant to the provisions of 28 U.S.C. Section 636 and General Order 194 of the United States District Court for the Central District of California.
Petitioner Harvey Weaver was convicted of two counts of committing lewd acts upon a minor (Cal. Pen. Code Section 288(a)). Petitioner, in seeking a writ of habeas corpus from this court, makes four contentions regarding ineffective counsel.

BACKGROUND

Petitioner was convicted of molesting his six years old step-granddaughter on two occasions. The first occurred when the Petitioner was entertaining 30 - 40 guests at his home on Thanksgiving Day, 1981. When thew guests were getting ready to eat, the victim entered the petitioner's bedroom and bathroom and thew Petitioner sexually molested her. The seconds act of sexual molestation occurred before Christmas, 1981.

The victim was 12 years old when she first informed her aunt about the abusive behavior and molestation of her step-grandfather. The reluctance to timely reveal these two incidents, as well as years of abuse and molestation, resulted from her belief in the threats Petitioner made to her regarding her life and her family. After the disclosure, the victim's mother contacted the Petitioner in a recorded conversation. During this conversation, made with the assistance of the Torrance Police Department, Petitioner eventually acknowledged lewd conduct with his step-grandchild.

DISCUSSION

In order for the Petitioner to prevail he must meet the test established in Strickland pertaining to the ineffectiveness of his trial counsel. Petitioner bears the burden to prove: (1) that his counsel made errors or omissions which reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent defense attorney, and (2) were it not for these errors, it is reasonably probable Petitioner would have received a more favorable result. Strickland v. Washington, 466 U.S. 688, 690, 693, 696 (1984). Therefore, to establish the ineffectiveness of counsel petitioner must show deficient performance and a prejudicial result. Id. at 693.

CONTENTION

Petitioner contends that his counsel was ineffective by not investigating and presenting a defense regarding his contentions that the victim had been "brainwashed" into making false accusations.
However, trial counsel did not have any reason to believe that the victim had been "brainwashed" except for the contention of the petitioner. A trial counsel's decision not to put forth a certain defense does not necessarily constitute ineffective

assistance. Greenfield v. Gunn, 556 F.2d 935 (9th Cir. 1977). Apparently, trial Counsel's examination of the victim was brief regarding outside influence for good reason, During the preliminary hearing, after extensive examination of the victim, the court had found her testimony to have "every possible characteristic of the truth." However, trial counsel did question the victim during trial regarding and outside influences on her testimony, which she answered in the negative, and he chose not to rigorously cross-examine the child. Accordingly, counsel,counsel's judgment not to assert a defense of "brainwashing", especially since the case was being tried before a judge and not a jury, fell within the reasonable trial tactics of a competent attorney.

CONTENTION II

Petitioner contends that his counsel was ineffective by not objecting to the introduction of the tape recorded telephone conversation and by not questioning the parties regarding the conversation.

The taped conversation between the victim's mother and the petitioner was admissible. Petitioner argues that the conversation was made at the insistence of the Torrance Police Department with the objective of obtaining a confession. However, the conversation between the victim's mother and the petitioner was of their own free will and not coerced in any way.

A defendant does not have a justifiable and constitutionally protected expectation that a person with who he is conversing will not then or later reveal the conversation to the police. Katz v. United States, 389 U.S. 347 (1967). A tape recording made with the consent of one party to a conversation, even if authorized by law enforcement is lawful. People v. Murphy, 105 Cal. Rptr. 138 (1972); People v. Towery, 220 Cal. Rptr. 475 (1985).

Actually, the trial attorney did in fact to the introduction of the taped conversation the day after it was offered into evidence. The court granted permission to relate back to that portion of the proceedings. However, after the court allowed counsel to reopen, the objection was denied.
Defense counsel did in fact question both of the parties as to the contents, state of mind and motives regarding the conversations. Furthermore, in a reasonably tactical action, counsel did call rebuttal witnesses in order to justify and discredit the substance of the recorded conversation.

CONTENTION III

Petitioner contends that his counsel was ineffective by not presenting evidence of petitioner's good character.
The choice not to provide the prosecution the opportunity to introduce additional step-children, who had apparently been abused by Petitioner, appears to be a prudent tactical decision. Evidence of defendant's bad character is not admissible unless he first introduces evidence of his good character. (Evid. Code 1102); People v. Pangelina, 199 Cal. Rptr. 916 (Cal. App. 1 Dist. 1984). Accordingly, counsel has broad discretion in determining the possible benefits and detriments in calling character witnesses.

CONTENTION IV

Petitioner contends that his counsel was ineffective by not knowing the law as: (1) Counsel objected to the fact that the exact time the alleged acts were supposed to have occurred was not stated in the charges; (2) counsel objected to the testimony of a prosecution witness on the grounds the testimony was barred by the statute of limitations; (3) Counsel was not aware that petitioner's sentence was illegal and did not object to it.

An examination of the record indicates that counsel represented Defendant in a reasonably competent manner. He successfully had one count dismissed prior to trial and obtained acquittals on two other counts. The Petitioner has failed to demonstrate prejudice as a result of the facts on which he bases his claim that the trial counsel did not know the law.

Conclusion

It is RECOMMENDED that this court issue an order dismissing Petitioner's petition.

DATED: June 15, 1993

signed
JOSEPH REICHMANN
United States Magistrate Judge